

1 THE HON. THOMAS O. RICE

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11 UNITED STATES DISTRICT COURT  
12 EASTERN DISTRICT OF WASHINGTON

13 HELL YEAH CYCLES, a Washington  
14 Limited Liability Company,

15 Plaintiff,

16 vs.

17 OHIO SECURITY INSURANCE  
18 COMPANY, a foreign insurer,

19 Defendant.

No. 2:13-cv-00184-TOR

AFFIDAVIT OF JOSHUA B. LANE  
IN SUPPORT OF DEFENDANT'S  
OPPOSITION TO SUMMARY  
JUDGMENT

20 STATE OF WASHINGTON )  
21 COUNT OF KING )ss  
22 )

JOSHUA LANE, being first duly sworn on oath, deposes and states:

23

AFFIDAVIT OF JOSHUA B. LANE IN  
SUPPORT OF DEFENDANT'S OPPOSITION  
TO SUMMARY JUDGMENT [2:13-cv-00184-  
TOR] - 1  
jh/JMS1379.274/1317656X

WILSON SMITH COCHRAN DICKERSON  
A PROFESSIONAL SERVICE CORPORATION  
901 FIFTH AVENUE, SUITE 1700  
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1       1. I am one the attorneys for Defendant Ohio Security Insurance  
2 Company. I make this affidavit based on personal knowledge and am otherwise  
3 competent to testify.

4       2. Attached hereto are true and correct copies of the following  
5 exhibits:

- 7             • Exhibit 1: Ohio Security's First Interrogatories and Requests for  
8                 Production ("Discovery Requests");
- 9             • Exhibit 2: Plaintiff's Answers to Ohio Security's Discovery  
10                Requests;
- 11            • Exhibit 3: October 24, 2013 letter to Plaintiff requesting discovery  
12                conference to discuss Plaintiff's incomplete, vague and/or non-  
13                responsive answers to Ohio Security's Discovery Requests;
- 14            • Exhibit 4: Email chain containing October 25, 2013 emails to and  
15                from Plaintiff, and November 7, 2013 emails to and from Plaintiff;  
16                and
- 17            • Exhibit 5: Deposition of David Bjorklund;

20       3. When Plaintiff requested additional payments from Ohio Security  
21 for alleged financial losses and related claims, Ohio Security requested evidence  
22 of the loss. Plaintiff failed to produce such evidence.  
23

1       4. After Plaintiff filed its lawsuit for bad faith and related claims,  
2 Ohio Security repeated its request for evidence of Plaintiff's damages. Ex. 1.  
3 Once again, Plaintiff failed to provide the requested evidence. Ex. 2 (Plaintiff's  
4 Answers to Ohio Security's Discovery Requests); Ex. 3 (October 24, 2013 letter  
5 to Plaintiff requesting discovery conference to discuss Plaintiff's incomplete,  
6 vague and/or non-responsive answers to Ohio Security's Discovery Requests).  
7 For example, Interrogatory No. 9 to Ohio Security's Discovery Requests asks  
8 Plaintiff to fully describe (1) the nature of Plaintiff's injuries and claims; (2) the  
9 dollar amount of each claim; and (3) the method of calculating damages. Ex. 1  
10 (Interrogatory No. 9). In response, Plaintiff answered:  
11

12       Itemized lists of business personal property have previously been  
13 provided to Ohio Security on multiple occasions. Plaintiff also has  
14 not been compensated for rental of temporary storage space.  
15 Plaintiff was delayed in reopening for business due to non-  
16 payment or delayed payment by Ohio Security. Plaintiff has not  
17 reopened the Service Department of Hell Yeah Cycles because it  
18 does not have funds to do so. ***Those damages are ongoing and  
not yet calculated.*** Plaintiff has incurred unreimbursed costs in  
defense of the BAM Self Storage litigation. ***This Answer will be  
supplemented.***

19       Ex. 2 (Answer to Interrogatory No. 9). First, Plaintiff concedes that Ohio  
20 Security paid the \$80,000 limits of Plaintiff's Business Personal Property  
21 coverage prior to the lawsuit, subject to Plaintiff's "itemized lists of business  
22 personal property." Cf. Plaintiff's Statement of Undisputed Facts in Support of  
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1 Motion for Summary Judgment (“SOF”), No. 4. Second, Plaintiff concedes that  
2 Ohio Security paid \$14,000 for rental of temporary storage space, despite its  
3 answer to Interrogatory No. 9. SOF, No. 17. Third, Plaintiff provides no  
4 evidence in support of its conclusory statements regarding damages. Fourth,  
5 Plaintiff notes that damages have not been calculated, despite Ohio Security’s  
6 request that Plaintiff calculate the damages. Ex. 2 (Answer to Interrogatory No.  
7 9). Fifth, and most significantly, Plaintiff promised to supplement this answer.  
8 Plaintiff never supplemented this answer.

9  
10 5. Similarly, Interrogatory No. 19 asked Plaintiff, among other things,  
11 to identify Plaintiff’s damages with regard to Plaintiff’s allegations of violations  
12 of the Consumer Protection Act. Ex. 1 (Interrogatory No. 19). In its Answer,  
13 Plaintiff only states “See claims previously submitted. This answer will be  
14 supplemented.” Ex. 2 (Answer to Interrogatory No. 19). However, Plaintiff’s  
15 previously submitted claims do not identify Plaintiff’s damages with regard to  
16 Plaintiff’s allegations of violations of the Consumer Protection Act. And again,  
17 Plaintiff promised to supplement this answer but never did.  
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20 6. Similarly, Requests for Production 27, 29, and 30 all seek  
21 production of Defendants’ evidence of damages. Ex. 1. Plaintiff responded that  
22  
23

1 these records would be made available for inspection upon ten days' notice. Ex.

2.

3       7. During a discovery conference on October 25, 2013, Ohio  
4 Security's counsel discussed the necessary production of Plaintiff's evidence of  
5 damages, and provided notice that Ohio Security wished to inspect and copy  
6 Plaintiff's evidence as soon as possible. Plaintiff's counsel claimed that Plaintiff  
7 possessed the requested evidence of damages, that Plaintiff's counsel did know  
8 in what form the evidence existed, but that Plaintiff would either produce the  
9 evidence or make it available for inspection. Ex. 4 (October 25, 2013 email  
10 from Plaintiff).

12       8. Having heard nothing further from Plaintiff, Ohio Security  
13 followed up with Plaintiff on November 7, 2014, with regard to the status of the  
14 production of the missing evidence. Ex. 4 (November 7, 2013 email to  
15 Plaintiff). Plaintiff's counsel responded: "I'm working on it. I think we are  
16 waiting for one more item." Ex. 4 (November 7, 2013 email from Plaintiff).  
17 Despite Plaintiff's representations, Plaintiff never produced the requested  
18 evidence and never made the evidence available for inspection. Instead, while  
19 Ohio Security waited for the promised evidence production and/or notice that  
20 the record, Plaintiff filed this Motion. As a result, Ohio Security has been  
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1 unable to complete its discovery, retain experts to review Plaintiff's evidence of  
2 damages, and to make its own dispositive motions.

3       9. Plaintiff concedes that the extent of Plaintiff's losses in the fire  
4 remains disputed, contrary to Plaintiff's Statement of Undisputed Facts ("SOF")  
5 No. 3. The maximum limit of Plaintiff's Business Personal Property coverage is  
6 \$80,000, contrary to Plaintiff's claim that the limit is more than \$80,000 (SOF  
7 No. 4, SOF No. 11) and actually \$120,000. *See* Mot. at 3 n.1. Ohio Security's  
8 adjuster, David Bjorklund, denies misrepresenting Plaintiff's policy benefits and  
9 coverages. Ex. 5 (excerpt from deposition transcript of Mr. Bjorklund). Fire  
10 investigators and other witnesses identified that there were up to five businesses  
11 occupying the business space used by Plaintiff on the date of loss, but Plaintiff  
12 failed to identify these other businesses. Ex. 3 (referencing Interrogatory 5 to  
13 Ohio Security's Discovery Requests). Plaintiff has refused to identify the scope  
14 of the claims made by these other entities. Ex. 3 (referencing Interrogatories 6  
15 and 14 to Ohio Security's Discovery Requests).

16       10. Plaintiff has never produced a signed verification page for its  
17 Answers to Ohio Security's Discovery Requests.

18       11. Plaintiff failed to produce evidence of damages necessitating the  
19 application of "additional coverages" to the policy beyond those paid by Ohio  
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21

1 Security to date. Plaintiff has failed to produce evidence of damages  
2 substantiating any of its claims. Adjuster David Bjorklund did not advise  
3 Plaintiff's owner to throw away Plaintiff's tools. Dep. of Bjorklund, p. 47:21-  
4 49:10, Ex. 5. Indeed, Plaintiff's independent choice to throw away the tools  
5 before allowing Ohio Security an opportunity to determine their value, in  
6 addition to Plaintiff's failure to provide other evidence of their value, creates a  
7 question of fact as to their value. Mr. Bjorkulnd advised Plaintiff's owner "that  
8 the tools likely would clean up with labor." Ex. B to Affidavit of B. Sheldon,  
9 #000026.

10  
11 12. Contrary to SOF 24-27, Plaintiff has failed to provide evidence of  
12 its damages related to employee wages beyond the W-2 forms. Ex. 5., p. 34.  
13  
14 Contrary to SOF 28-29, Plaintiff failed to provide evidence of the value of the  
15 kitchen cabinets. *Id.*, p. 38-39. Contrary to SOF 30-33 and 35, whether or not  
16 Plaintiff is are entitled to payment under additional coverages under the policy  
17 remains an issue of fact. Contrary to SOF 34, Ohio Security did not advise  
18 Plaintiff that it would have to produce documents that did not exist, only the  
19 responsive, non-privileged documents in existence. Plaintiff promised to  
20 supplement its productions and notify Ohio Security when Ohio Security could  
21 inspect the requested records, however, Plaintiff filed this Motion before so  
22  
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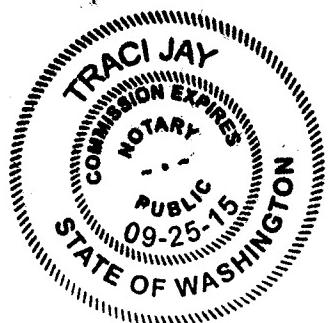
1 notifying Ohio Security. SOF 36 is unsupported by citation to affidavit and  
2 unsupported by any evidence produce by Plaintiff.

13. Plaintiff has failed to provide evidence that any of David Bjorklund's alleged "errors" caused measurable damages to Plaintiff.

DATED this 3rd day of February, 2014.

Joshua B. Lane

SUBSCRIBED AND SWORN TO before me this 3<sup>rd</sup> day of February, 2014.



Notary Public in and for the State of  
Washington  
Residing at Seattle  
My Commission expires: 9.25.15

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**CERTIFICATE OF SERVICE**

2 I certify that on the 3<sup>rd</sup> day of February, 2014, I electronically filed the  
3 foregoing with the Clerk of the Court using the CM/ECF System, which will  
4 send notification of such filing to all attorneys for record, including the  
following:

5 Brian S. Sheldon                    bsheldon@spokelaw.com

6  
7                                         s/ Joshua B. Lane

8                                         Joshua B. Lane

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